

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUAN F. RAMIREZ

Claimant

VS.

FARMLAND FOODS INC.

Respondent

AND

AETNA CASUALTY & SURETY COMPANY

Insurance Carrier

ORDER

Claimant appealed the decision dated May 18, 1998, entered by Judge Jon L. Frobish. The Appeals Board heard oral argument on December 21, 1998.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for the claimant. Edward D. Heath, Jr. of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award dated January 3, 1994, and the Award of Review and Modification dated May 18, 1998. In addition, the record includes the transcript from the settlement hearing proceeding held before Judge Krysl in January 1994.

ISSUES

This is a claim for an August 3, 1992 accident. Judge Krysl initially entered an Award dated January 3, 1994, finding that claimant had a 10 percent permanent partial general disability. By decision dated May 18, 1998, Judge Frobish denied modification of the initial Award.

The issues before the Board on this appeal are:

1. Does the Division have the jurisdiction to review and modify an award when an application is not filed as required by K.S.A. 44-528?
2. If so, have circumstances changed to justify modification of the initial award?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

- (1) The parties appeared before Judge Krysl in January 1994 for a settlement hearing. The Judge refused to approve the terms of the lump sum settlement but instead stated that she would enter a running award.

THE COURT: Mr. Ramirez, after looking at the evidence and hearing your testimony and hearing from your attorney, I cannot approve this settlement. I do not approve it. I will not approve it because I do not believe that it is fair, I do not believe it is just and I do not believe it is equitable to you. I believe that you are taking this money out of duress, out of a very shortsighted situation and I think it would be the worst thing in the world for you to do. Therefore, I am not approving the \$10,000 lump sum settlement. The attorneys have -- I have taken pre-trial stipulations. They have stipulated everything into the record including the reports of Dr. Ozanne and Dr. Schlachter and I will be sending out a running award within a week. Anything further for the record?

MR. KING: Not for the claimant.

MR. HEATH: Nothing for the respondent, Your Honor.

THE COURT: There being nothing further for the record, we stand adjourned.

None of the parties objected to the Judge's statements or intentions to enter the running award.

- (2) On January 3, 1994, Judge Krysl entered a final award finding that Mr. Ramirez had a 10 percent permanent partial general disability.
- (3) At the time of the award, Mr. Timothy King represented Mr. Ramirez and Mr. Edward Heath, Jr., represented the respondent and its insurance carrier. Both attorneys received copies of the Award.

(4) When none of the parties appealed, the Appeals Board entered its Order approving the Award as then required by K.S.A. 44-551. None of the parties appealed the Board's Order.

(5) On January 28, 1994, Mr. King mailed to Mr. Heath a formal demand for the compensation that was awarded in the January 3, 1994 decision.

(6) In May 1994, attorney C. Albert Herdoiza entered his appearance as the attorney for Mr. Ramirez. Mr. King then filed his notice of withdrawal as Mr. Ramirez's counsel.

(7) In February 1995, Mr. Herdoiza requested a settlement conference which the Division scheduled for April 1995. Between May 30, 1995, and April 28, 1997, Mr. Herdoiza scheduled and deposed his witnesses.

(8) After taking two years to complete five depositions, Mr. Herdoiza scheduled a hearing before Judge Frobish. The notice for that hearing was titled "Notice of Review and Modification/Regular Hearing". Judge Frobish conducted the hearing, which the Judge characterized as a review and modification hearing, on February 26, 1998. At the hearing's conclusion, the Judge set the parties' terminal dates for completing their evidence.

(9) At Mr. Ramirez's April 1997 deposition the parties discussed his contention that the January 3, 1994 Award was not properly entered. But Mr. Ramirez did not raise that as an issue when Judge Frobish conducted the February 26, 1998 hearing. Further, Mr. Ramirez did not otherwise raise the issue as he did not file a submission letter at the conclusion of his terminal date.

(10) At the conclusion of their terminal date, Farmland Foods and its insurance carrier filed their submission letter in which they argued, among other things, that the Division did not have the jurisdiction to review and modify the Award because Mr. Ramirez never filed an application as required by K.S.A. 44-528. Additionally, they argued that there was not a change of circumstances to support modification of the Award and that the Award should be diminished or canceled because Mr. Ramirez had moved to Mexico.

(11) Based upon the statements made to Judge Frobish at the February 1998 hearing and the contents of Farmland's submission letter, the only issues presented to the Judge for decision were (1) whether the Division could entertain the request for review and modification and (2) if so, was there a change of circumstances to justify modification of the Award.

(12) In the May 18, 1998 Award, the Judge denied Mr. Ramirez's request for review and modification as no application had been filed as required by statute.

CONCLUSIONS OF LAW

- (1) K.S.A. 44-528 requires a party to file an application for review and modification.
- (2) K.A.R. 51-19-1 provides that the application for review and modification shall set forth at least one of the reasons for modification as contained in K.S.A. 44-528.
- (3) Because Mr. Ramirez has not filed an application for review and modification and, therefore, has failed to comply with both K.S.A. 44-528 and K.A.R. 51-19-1, the request to review the January 3, 1994 Award must be denied.
- (4) The Award dated January 3, 1994, is a valid award as it was rendered by the Division with notice to the parties and not timely appealed.
- (5) The Appeals Board adopts the findings and conclusions set forth in the May 18, 1998 decision to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the Award of Review and Modification dated May 18, 1998, entered by Judge Jon L. Frobish.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director